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IN THE

Supreme Court of the United States

October Term, 1962

No. 140

NATHAN WILLNER,

Petitioner,

vs.

COMMITTEE ON CHARACTER AND
FITNESS, ETC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF AMICUS CURIAE OF THE COMMITTEE ON
THE BILL OF RIGHTS OF THE ASSOCIATION
OF THE BAR OF THE CITY OF NEW YORK

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**BRIEF *AMICUS CURIAE* OF THE COMMITTEE ON
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OF THE BAR OF THE CITY OF NEW YORK**

The Committee on the Bill of Rights files the annexed brief *amicus curiae* pursuant to consent of the parties hereto, submitted herewith.

Interest of *Amicus Curiae*

The Association of the Bar of the City of New York presently consists of more than 7,000 lawyers admitted to practice law in the State of New York and elsewhere. The Association was organized in 1871, and as stated in its Charter, its purposes include "cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, [and] elevating the standard of integrity, honor and courtesy in the legal profession
* * *."

The Association's Committee on the Bill of Rights is charged by The Association's By-Laws with responsibility for consideration and report on all matters relating to rights guaranteed by the Bill of Rights. When authorized by The Association's Executive Committee, it may participate as *amicus curiae* in pending litigation involving alleged deprivation of rights guaranteed by the Bill of Rights.

The Association of the Bar of the City of New York has for many years conducted grievance proceedings in the First Judicial Department of the State of New York, and brings to the attention of the Appellate Division of that Department violations by lawyers of statutes relating to positions of legal trust and other breaches of the Canons of Legal Ethics. Such charges are prosecuted by court-appointed attorneys, usually on the staff of The Association's Grievance Committee, and heard by a special court-appointed referee who reports to the court. The Committee on the Bill of Rights believes that an applicant for admission to the bar has an interest in a full and fair hearing at every stage of admission proceedings, no less than an attorney already admitted to practice has in disciplinary proceedings.

This case appears to be of the first importance for lawyers and their profession because it presents a fundamental challenge to the procedures by which admissions to the bar have been determined in the State of New York, one of the principal areas of lawyer concentration in the nation.

The members of both the Committee on the Bill of Rights of The Association of the Bar of the City of New York and its Executive Committee, which authorized the filing of this brief, are unanimous in their belief that an applicant for admission to the bar is entitled, as a matter of due process, to notice of charges against him, confrontation and opportunity for cross-examination of adverse

witnesses, and judicial determination of his admissibility on the basis of a record to which he is not denied access. Both Committees, however, are divided as to whether the record in this case presents all of the questions here discussed in wholly satisfactory form for decision on the merits, and are divided as to whether this is a proper case for intervention by the Committee on the Bill of Rights. A majority of both Committees, however, believe that on questions of such fundamental importance, The Association of the Bar of the City of New York should not be silent, particularly where, as here, certiorari has been granted, presumably with some or all of the questions here discussed in mind, and where a motion to dismiss the writ as improvidently granted has been denied. Accordingly, this brief is filed to state the views of the Committee on the Bill of Rights on these questions. Neither of the Committees, nor The Association, takes any position as to the qualifications of Petitioner for ultimate admission to the bar. This is of course a matter for determination by the Committee on Character and Fitness and by the courts of New York after such further proceedings as may be ordered by this Court.

This brief is addressed to the following principles:

1. That an applicant for admission to the bar is denied due process of law under the Fourteenth Amendment to the Constitution of the United States when a Committee on Character and Fitness, with authority to certify the applicant's qualifications for admission to the admitting Court (a) fails to give notice of the charges against him in advance of the hearings before that Committee, or (b) considers derogatory statements made to it as evidencing the applicant's lack of the necessary qualifications for admission, without confronting the applicant with those persons, and without subjecting their statements to his cross-examination.

2. That a state Court denies an applicant due process of law when it rules on the merits of a claim that earlier denials of his application for admission to the bar were themselves infected by denial of due process, on the basis of a record the applicant does not know is before that Court, and which is not made available to the applicant until after certiorari is granted by the Supreme Court of the United States.

Statement

A. Applicable Statutes and Rules

Section 90(1)(a) of the Judiciary Law of the State of New York vests in the Appellate Division of the State Supreme Court of each of the four Judicial Departments of the State the power to admit applicants to the bar. Under that Section, the Appellate Division may not admit an applicant to practice without certification by the State Board of Bar Examiners that he has either passed the bar examination or that the bar examination has been dispensed with. Thereafter, the Appellate Division to which an applicant has been certified by the Board of Bar Examiners,

"if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys." [Judiciary Law § 90(1)(a).]

Rule 1 of the New York Rules of Civil Practice provides in part:

"(a) The appellate division in each judicial department shall appoint a committee of not less

than three practicing lawyers for each judicial district within the department, for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state. Each member of such committee shall serve until his death, resignation or the appointment of his successor. A lawyer who has been or who shall be appointed a member of the committee for one district may be appointed a member of the committee for another district within the same department.

“(d) Unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. To enable the committee to make such investigation the committee, subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth in his usual handwriting all the information and data required by the committee and the appellate division justices, including specifically his present and past places of actual residence (listing the street and number, if any) and the period of time he resided at each place.

“(e) In the event that any applicant has made a prior application for admission to practice in this state or in any other jurisdiction, then, upon said statement or questionnaire or in an accompanying signed statement, he shall set forth in detail all the facts with respect to such prior application and its disposition. If such prior application had been filed in any appellate division of this state and if the applicant failed to obtain a certificate of good character and fitness from the appropriate character committee or if for any reason such prior application was disapproved or rejected either by said committee or said appellate division, he shall obtain and

submit the written consent of said appellate division to the renewal of his application in that appellate division or in any other appellate division."

Section 53(1) of the Judiciary Law authorizes the Court of Appeals to

"adopt, amend, or rescind rules not inconsistent with the constitution or statutes of the state, regulating the admission of attorneys and counsellors at law, to practice in all the courts of record of the state."

Pursuant to that authority, the Court of Appeals has promulgated separate Rules for the Admission of Attorneys and Counsellors-at-Law which provide in part as follows:

"VIII-1. General Regulation. Every applicant for admission to the Bar must produce before a Committee on Character and Fitness appointed by an Appellate Division of the Supreme Court and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counsellor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides, one of whom must be a practicing attorney of the Supreme Court of this State.

"VIII-2. Supporting Affidavits. Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character and must set forth in detail the facts upon which such knowledge is based. Such affidavits shall not be conclusive, and the court may make further examination and inquiry through its Committee on Character and Fitness or otherwise.

"VIII-3. Certificate of Board of Law Examiners. Every applicant who pursued the study of law pursuant to these Rules must file with such Committee on Character and Fitness his certificate from the State Board of Law Examiners showing compliance with these Rules.

"VIII-4. Discretion of Appellate Division. The justices of the Appellate Division in each department shall adopt for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper."

The Appellate Division of the First Department has not published "additional rules" under Rule VIII-4. The Character and Fitness Committee of the First Judicial Department, designated in accordance with these rules, consists of ten members. No rules or statements of procedure have been published by the Committee.

Section 90(10) of the Judiciary Law provides, in part, with respect to the records of proceedings in bar admission proceedings:

" * * * all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law. * * * shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. * * * In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary."

Rule 1(g) of the Rules of Civil Practice provides:

"(g) Every application for admission to practice, together with all the papers submitted thereon, upon its final disposition by the appellate division shall be filed in the office of the clerk of such appellate division."

B. Willner's Petition to the Appellate Division

The proceeding now before this Court began with a verified Petition, dated May 22, 1961, filed by Willner with the Appellate Division, First Department, pursuant to Rule

1(e) of the Rules of Civil Practice, designated a "Petition for Leave to File Application For Admission to the Bar." The Petition, filed *pro se*, alleged, in substance, that:

Willner had been certified by the State Board of Law Examiners as having passed the bar examinations in 1936 (R. 2-3); that the Committee on Character and Fitness ("the Committee") had, in 1938, after "several hearings," filed with the Appellate Division, its determination

"that it is not satisfied and cannot certify that the applicant possesses the character and general fitness requisite for an attorney and counselor at law, as provided by Section 88 [now 90] of the Judiciary Law";

that, in 1943, Willner applied to the Appellate Division for an order directing the Committee to review its 1938 determination, this motion being denied without opinion; that Willner, in 1948, again petitioned the Appellate Division for re-examination of his application by the Committee, or to permit a new application to be filed, and that the Appellate Division then directed that he be permitted to file a new application; that upon the filing of Willner's new application, the Committee conducted two hearings in 1948, and, "by its Report of June 9, 1950," for the second time, the Petition alleges, refused to certify him, "without stating any sufficient reason, excuse or standard" (R. 3); that in April 1951, Willner again made application to the Appellate Division, this time for an order directing (a) that he be enrolled as an attorney, (b) that the Committee be directed to furnish him with a statement of its reasons for its refusal to certify him, or (c) that a Referee be appointed to hear and report on the question of his character and fitness, and that this application was denied without opinion (R. 3-4); that in May 1954, he filed a fourth application with the Appellate Division, requesting leave to file an application for admission *de novo*, which application was denied without opinion, the Court of Appeals refusing leave to appeal and this Court refusing a

writ of certiorari (R. 4); that in 1960, Willner filed his fifth application with the Appellate Division (for leave to file an application for admission *de novo*), which application was denied without opinion on November 2, 1960 (R. 4).

The Petition further alleged that Willner has been a member in good standing of the New York Society of Certified Public Accountants and the American Institute of Accountants since 1951; and that he has been admitted to practice before the Tax Court and the Treasury Department since 1928 (R. 4-5).

The Petition then alleged "the basic facts" concerning "the background of my various hearings" before the Committee on Character and Fitness (R. 5). It alleged that, in connection with Willner's hearings before the Committee on his 1937 application, he was confronted with a letter, containing certain false statements about Willner, from a New York attorney, Leo M. Wieder; that a member of the Committee promised Willner a personal confrontation with Wieder, but that later on, he "could only infer" that the Committee refused a confrontation of Mr. Wieder (R. 5-7); and that the Committee "apparently sustained" Wieder's charges (R. 10). The Petition also contained allegations that Willner had been involved in litigation with a lawyer from Peekskill, New York, James Dempsey, who had it as his purpose "to destroy me" (R. 8), that the Committee Secretary was "taking orders" from Dempsey (R. 9), and that two members of the Committee were "in cahoots" with Dempsey (R. 9).

The Petition concluded with a prayer that Willner be given the opportunity (a) to appear again before the Committee, (b) to appear before a Referee empowered to hear and report on the facts, or (c) be admitted to the bar forthwith (R. 12).

C. Proceedings in the Appellate Division

Following the service and filing of the above Petition, the Committee, named as the Respondent, served no papers on Willner in opposition to the Petition, and did not "appear" in opposition to the Petition. However, the Appellate Division had, as part of its own records under Rule 1(g) of the Rules of Civil Practice, the original papers constituting the file on Willner, including Willner's two original questionnaires, filed with the Committee, investigators' reports on those applications, letters from lawyers and others complaining of Willner, affidavits attesting to good character, internal Committee correspondence concerning Willner's applications for admission, the earlier applications to the Appellate Division, internal correspondence of the Committee relative to those applications, the minutes of Willner's various hearings before the Committee, and reports to the full Committee by Committee members assigned to furnish such reports.¹ This file of papers, some two inches thick, was, as we shall see, also before the Court of Appeals, and now reposes in the Office of the Clerk of this Court (see *infra*, pp. 14-15).

The Appellate Division, with Willner's Petition and this file as part of its own records, denied the Petition without opinion (R. 13). The recitals in the order of the Appellate Division listed Willner's Petition, but not the other papers constituting its own file as being before it in its consideration of the Petition:

"Now, upon reading and filing the notice of motion, with proof of due service thereof, and the petition of Nathan Willner, duly verified the 22nd day of May, 1961, in support of said motion, and after hearing Mr. Nathan Willner, pro se, for the motion, and no one appearing in opposition thereto,

¹ Portions of the papers constituting this file, including the minutes of previous hearings before the Committee, had been made available by the Clerk of the Appellate Division to an attorney of Willner in connection with earlier proceedings in 1950 (Cr. D. 68-69).

"It is ordered that the said motion be and the same hereby is denied."

D. Proceedings Before the Court of Appeals

Willner sought leave to appeal from the Appellate Division's order to the Court of Appeals (R. 17). He furnished an affidavit in support of his motion for leave which asserted that:

"An examination of the record in this proceeding will disclose that the Committee reported adversely to my admission mainly, and perhaps solely, because of accusations made by two lawyers, Leo M. Wieder who was discredited and James Dempsey who was brought up on charges of jury tampering. To the best of my knowledge, they were made in writing, whether by simple letters or by formal affidavits, I do not know. On either way, they were ex parte statements, which had common law rules of procedure and evidence followed [sic], would have been clearly inadmissible." (R. 20).

" * * * I was never afforded the opportunity of confronting my accusers, of having the accusers sworn and cross-examining them, and the opportunity of refuting the accusations and accusers." (R. 20-1).

The Committee filed no papers in opposition to the motion for leave to appeal. The Court of Appeals granted leave to appeal, Willner having limited his grounds of appeal to the claimed denial of confrontation and cross-examination (R. 22-3). In the Court of Appeals, Willner filed his Petition in the Appellate Division, the Appellate Division's order, and his motion for leave to appeal with supporting affidavit. The Clerk of the Court of Appeals, however, on March 6, 1962, requested the Clerk of the Appellate Division to "forward your complete file relative to the above case" (Cr. D. 93). The Appellate Division then forwarded to the Court of Appeals the file referred to above—containing the original papers on Willner's several applications for admission to the bar (Cr. D. 94-96).

The case was argued orally before the Court of Appeals, Willner being represented by counsel. There was, however, no appearance by the Committee before the Court of Appeals.²

Willner's brief before the Court of Appeals, which we have examined, argued that Willner had been denied his constitutional rights in his proceedings before the Committee—it argued that he had been denied confrontation of his accusers and noted that, even now, he could not be sure of the Committee's reasons for refusing to certify him for admission to the bar. The argument in that brief was based upon the facts recited in Willner's Petition to the Appellate Division and in Willner's affidavit in support of the motion for leave to appeal (R. 18-23). Willner's attorney has written the Committee on the Bill of Rights that he was not aware at the time of the submission of the cause to the Court of Appeals that the Appellate Division file was before the Court of Appeals.³

The Court of Appeals affirmed the order appealed from without opinion (11 N. Y. 2d 866).

Thereafter, at Willner's request, the Court of Appeals amended its remittitur to recite that

"Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellant contended that he was denied due process of law in

² So far as can be gleaned from the reported decisions, no Character Committee has ever appeared before the Court of Appeals, except in the case of *Matter of Anonymous*, 10 N. Y. 2d 740, 219 N. Y. S. 2d 410, where that Court had ordered it to appear. See n. 12, *infra*.

³ In an affidavit filed by the Attorney General of the State of New York in this Court, verified October 10, 1962, in support of a cross-motion to dismiss the proceeding it is stated (p. 4) that that file was first made available to him after certiorari was granted by this Court on June 25, 1962.

violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights." (R. 28)

E. The Petition for Writ of Certiorari

The Petition for Certiorari was filed May 23, 1962. The papers submitted by the Petitioner to the Supreme Court at that time did not include the Appellate Division file which had been furnished to the Court of Appeals at that Court's request, and which, unknown to Willner's attorney, had been part of the record upon which that Court had considered the appeal.

The Petition stated that Willner did not know *why* he was refused admission to the bar, but "surmises" that it was based on affidavits or letters from the two lawyers, Messrs. Wieder and Dempsey, mentioned in his Petition to the Appellate Division, and urged that Willner had been denied due process of law in that the Committee did not require them to appear in person before the Committee, confront Willner, and be subject to cross-examination.

A brief in opposition to the Petition for a Writ was filed on behalf of the Respondent Committee by the Attorney General of New York. That brief was based on matters contained in the papers Willner had filed in the Supreme Court. It made no reference to the Appellate Division file which had been forwarded to the Court of Appeals.

The Petition for Certiorari was granted June 25, 1962 (370 U. S. 934).

F. Designation of Record in Supreme Court; Motion to Dismiss

On July 3, 1962, Willner filed in this Court a designation of the record to be printed in the Supreme Court, designating:

"The entire record in the proceeding, now on file in your office."

The Attorney General, on July 13, 1962, filed a cross-designation, to include:

“any portion of the entire record in the proceeding which is not on file in your office.”

The cross-designation explained that while Willner’s attorney had assured the Attorney General that the entire record would be printed, the Attorney General, if this were not done, would arrange to supply the balance, subject to the following:

“This will, of course, not include any confidential reports which may have been acted upon by the respondent-appellee [the Committee] or by any of the New York courts.” (Italics supplied.)

On October 5, 1962, the Attorney General served an amended cross-designation. This time he listed 96 separate items constituting the Appellate Division file which had been before the Court of Appeals. Willner thereupon served a motion to require the Clerk to print only those papers covered by his earlier designation. On October 12, the Attorney General filed a cross-motion to dismiss the proceeding on the ground that certiorari had been improvidently granted, upon an affidavit of the Assistant Attorney General in charge of the appeal which alleged, *inter alia*:

“After the Court granted certiorari, the Appellate Division file was made available to the deponent [*i.e.*, to the Attorney General].” (Respondent’s Cross-Motion to Dismiss, p. 4.)

That affidavit argued that the Appellate Division file showed that the determinations made by the Character Committee with respect to Willner in 1938 and 1950 were not based upon *ex parte* complaints, but upon Willner’s own admitted misrepresentations to the Committee during the course of hearings, his lack of candor, etc. (*id.* at 4-6). The affidavit requested that the Supreme Court should review its grant of certiorari on “the entire file” now before it, and dismiss the proceeding (*id.* at p. 8).

On October 30, 1962, the attorneys for both parties filed a stipulation that the 96 items referred to in the Attorney General's amended cross-designation were to be deemed part of the record before the Supreme Court, but that they were not to be printed. The Attorney General's motion to dismiss the proceeding on the basis of "the entire file" was denied November 13, 1962 (R. 29; 371 U. S. 900).

G. The Record Now Before This Court.

Critical items in the Appellate Division file now before the Supreme Court include the transcripts of Willner's several hearings before the Committee, and the reports on the case written to the full Committee by individual Committee members dated May 16, 1938 (Cr. D. 71), November 4, 1948 (Cr. D. 74), and May 31, 1950 (Cr. D. 76). All of this material was available to the Appellate Division and was actually before the Court of Appeals. It appears from the Appellate Division file that the hearing transcripts had been made available to one of Willner's attorneys in 1950 (Cr. D. 69). It does not appear, however, that the reports to the Committee by its individual members, or by Committee investigators (Cr. D. 8, 23), including analyses of complaints received by the Committee and of Willner's explanations respecting those matters, all of which were in the Appellate Division file, were made available to Willner prior to the issuance of this Court's writ of certiorari. Indeed, the brief of the Attorney General in this Court, referring to what may have been made available to one of Willner's attorneys in 1947, candidly states:

"Intra-Committee and Intra-Court reports were probably not made available [to Willner's attorney], by reason of their confidential aspect" (Brief, p. 34).

The Attorney General, before this Court, relies on the Appellate Division file, which includes those reports, as rebutting Willner's "assumption" that the Committee determined that he lacked the requisite character and fitness

on the basis of the *ex parte* charges of Messrs. Wieder and Dempsey. The Attorney General urges:

"The record [i.e., the Appellate Division file] clearly shows that the Committee's determination was predicated upon Willner's own questionnaires, affidavits and 'the record' which he himself made upon his appearance before the Committee and by his admitted conduct elsewhere. Whenever the Committee received information *ex parte* or through its investigators, Willner was then given an opportunity to admit, deny or offer an explanation of the material involved" (Brief, p. 65).

In sum, the Respondent argues in this Court that the decisions of the Courts below are to be sustained as consistent with due process on the basis of matters contained in a file which Willner did not know was being considered by those Courts when they were considering his latest Petition.

Summary of Argument

The Court of Appeals having certified that it necessarily passed upon whether Willner had been denied due process by denial of confrontation and cross-examination of the witnesses against him, we think that the constitutional question—on which this Court has granted review and has denied a motion to dismiss—is before this Court.

Bar admission, under New York and federal constitutional law, is a right. New York law provides that bar admission cases are judicial proceedings. Due process in judicial proceedings for the determination of rights requires advance notice of charges and an opportunity to confront and cross-examine one's accusers, and there is nothing either in the nature of the proceeding or the interest to be protected by the state which warrants a departure from these rules here. No case has been cited asserting that notice of charges, confrontation or cross-ex-

amination may be dispensed with in bar admission cases, and a number of state court opinions rule otherwise.

The Attorney General's brief argues that the Character Committee does not rely upon *ex parte* statements furnished to the Committee, but makes its determination on the basis of its appraisal of the applicant's own explanation regarding adverse information supplied *ex parte*. But we think the record and papers here demonstrate that the Character Committee in this case did attach evidential weight to such *ex parte* derogatory information and did not rely exclusively on the Petitioner's statements or responses.

Finally, we contend that due process was denied by the denial to the Petitioner of the right to argue his case in the Court of Appeals on the same record which that Court had before it, which record was not available to Petitioner prior to this Court's grant of certiorari. Consideration of the case upon the basis of a secret record precluded a meaningful hearing, and hence denied Petitioner his right to due process at that stage of the proceedings.

ARGUMENT

POINT I

Petitioner was denied due process of law by the failure to give notice in advance of hearings of the charges against him and the failure to provide for confrontation and cross-examination of adverse witnesses.

A.

A proceeding before the Appellate Division to secure admission to the bar is, under the law of our State, a "judicial" and not an "executive" proceeding. *Cooper's Case*, 22 N. Y. 67, 85.

"In regard to attorneys, the constitution confers the absolute right of admission upon everyone pos-

sessing the requisite qualifications. The court is called upon to determine as to the existence of this right. It being ascertained that the applicant possesses the requisite qualifications, his admission follows as a legal necessity. It is certainly clear, as a general rule, that whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceedings upon such an application are to be regarded as of a judicial nature *** (*Cooper's Case, supra*, at p. 86).

Such proceedings before the admitting court are among the general class of "special proceedings" under New York's Civil Practice Act "for the enforcement or protection of a right, the redress or prevention of a wrong" (NYCPA §§ 4, 5). *Matter of Mathot*, 222 N. Y. 8, 9; see also *Matter of an Attorney*, 83 N. Y. 164, 166. Orders denying admission to the bar are consequently appealable to the Court of Appeals, *Cooper's Case, supra*; *Matter of Anonymous*, 10 N. Y. 2d 740, 219 N. Y. S. 2d 410.⁴

Petitioner's application in this case under Rule 1(e) of the Rules of Civil Practice was a judicial proceeding. His basic contention in that judicial proceeding was that he should be permitted to file a new application for admission to the bar because the denial of his earlier applications had been infected by a denial of due process of law, in that the Committee had relied upon *ex parte* statements of two lawyers, denying him confrontation and cross-examination. As the amended remittitur of the Court of Appeals shows, the Court of Appeals entertained Petitioner's claim of such denial of due process on the merits, and decided that claim adversely to Willner. The Attorney General here argues (Brief, Point I) that the Court of Ap-

⁴ However, unless there has been a dissent in the Appellate Division, or unless a constitutional question is involved, the appeal does not lie as of right, and leave to appeal must be first sought. N. Y. State Const., Art. 6, § 7; N. Y. Civil Practice Act, § 588. Review by the Court of Appeals is, as in all cases, limited to questions of law (C. P. A. § 605).

peals was merely reviewing a "discretionary" order, and that the Petitioner "failed, at an appropriate time, to present his constitutional claim." Since the Court of Appeals has certified that it "necessarily" reached the merits of Petitioner's constitutional claim, we think that claim—that he was denied due process of law on his earlier applications for admission to the bar—is here for determination on the merits by this Court.

B.

This Court said in *Schware v. Board of Bar Examiners*, 353 U. S. 232, 238-39:

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment".⁵

See also *Konigsberg v. State Bar of California*, 353 U. S. 252; *Cohen v. Hurley*, 366 U. S. 117, 122. And as this Court pointed out in *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U. S. 886, 895-96, "the right to follow a chosen *** profession" is a substantial right and not a mere privilege.⁶

Procedural due process must be had, of course, in proceedings for bar admission. Thus, in *Goldsmit v. Board of Tax Appeals*, 270 U. S. 117, 123, this Court said that those seeking admission to the Bar are entitled, as a matter

⁵ In that connection, the Court also said [353 U. S. at 239, note 5]:

"We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace. *Ex Parte Garland*, 4 Wall. 333, 379."

⁶ Under New York law, of course, the "practice of law is a "right". See *Cooper's Case*; *supra*, p. 18.

of federal due process, to notice of hearing, notice of charges, and the right to answer the charges.

To determine what procedures due process may require, one "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." The governmental function involved here is "the power to regulate or license, as lawmaker, an entire trade or profession." *Cafeteria & Rest. Wkrs. U. Local 473 v. McElroy*, 376 U. S. 886, 895. - But the private interest, "the right to follow a chosen profession" (*id.* at 895-6), is a right, not a mere privilege, both under the *Cafeteria* case (*ibid.*) and under New York law (*supra*, p. 18). And since the proceeding is a judicial proceeding under New York law, it seems clear that trial-type procedures are constitutionally required.

This case does not involve questions of national security such as were involved in *Greene v. McElroy*, 360 U. S. 474, *Cafeteria, Bailey v. Richardson*, 341 U. S. 918 or *Peters v. Hobby*, 349 U. S. 331, where the government justified secrecy of the confidential information on the basis of the overwhelming interest in national security—indeed, here it is the governmental authority which divulges in this Court the "confidential" information, surely no less confidential now than when used to deny admission. Nor is there involved here a governmental employee subject to discharge at will who therefore conceivably might have no right to the protections of full due process. An attorney is not in that category. *Ex Parte Garland*, 4 Wall. 333, 378; see the *Cafeteria* case, *supra*, 367 U. S. at 895-6. Neither does the case at bar involve merely the right to work at one specific military installation, as in the *Cafeteria* case—it involves, rather, the opportunity to practice law before all the courts of a state, and before the federal courts which predicate admission to their bars upon admission to state bars. Finally, this is not a situation in which only a general fact-finding investigation is undertaken, where the "full panoply of judicial

procedures" need not be used, or where there is simply an investigation and report by a body, such as a Grand Jury, which "does not try" the factual issues. *Hannah v. Larche*, 363 U. S. 420, 442, 449; cf. *Anonymous Nos. 6 and 7 v. Baker*, 360 U. S. 287; *Cohen v. Hurley*, 366 U. S. 117. Here, the Character Committee acted as investigator, reporter, and trier of the facts, in what is an integral part of a judicial proceeding.

In such a proceeding as this, the normal rules of due process must apply, with the result that the applicant is entitled to such rights. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 93; *Morgan v. United States*, 304 U. S. 1, 18; *Kirby v. United States*, 174 U. S. 47, 55, 61; *Motes v. United States*, 178 U. S. 458, 467, 471; *United States v. Cohen Grocery Co.*, 255 U. S. 81, 87, 89; *United States v. Abilene & S. Ry. Co.*, 265 U. S. 274, 286-291; *Southern Railway Company v. Virginia ex rel. Shirley*, 290 U. S. 190.

Cf. Judge Edgerton, concurring in *Brooks v. Laws*, 208 F. 2d 18, 33 (D. C. Cir., 1953):

"When secret informants have made secret charges against an applicant possibly a Committee on Admissions may decline to recommend his admission, for its action is not final if he chooses to take his application to court. But for a court finally to reject an applicant because of secret charges by secret informants would be as shocking as to disbar a lawyer, or convict a man of crime, on such charges. By innocent mistake or incompetence or carelessness or malice a confidential informant may make false charges. Elementary fairness and therefore due process of law forbid finally rejecting, on grounds of character, an otherwise qualified applicant without allowing him a public opportunity to confront his accusers and refute their charges. The right to a public hearing is also a necessary safeguard against rejection because of charges which are true but irrelevant, e. g. that an applicant has unconventional social, political, or economic views."

Greene v. McElroy, 360 U. S. 474, 492, 507 makes clear that due process requires confrontation and cross-examination (360 U. S. at 496-499):

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurors or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, *** but also in all types of cases where administrative and regulatory actions were under scrutiny. ***"

"Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d ed. 1940) § 1367:

"For two centuries past, the policy of the Anglo-American System of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

Little need be added to this incisive summary statement except to point out that under the present clear-

ance procedures not only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the informant said without even examining the investigator personally."

C.

To our knowledge, no state court which has been confronted by the issue has asserted a principle that undisclosed evidence from witnesses not subject to cross-examination may be used constitutionally against bar applicants.

The Supreme Court of Florida has squarely held that due process is denied by the denial to an applicant of notice of charges and the right to confront and cross-examine. *Coleman v. Watts*, 81 So. 2d 650, not officially reported. Other state courts, perhaps motivated by a desire to preserve promised confidences, have held that one is entitled to notice of charges, and that evidence uncontested by the sword of cross-examination cannot constitutionally be considered against the applicant. Thus, in the case of *Application of Burke*, 87 Ariz. 336, 351 P. 2d 169, the court did not have before it the derogatory information which consisted of a report of the National Conference of Bar Examiners,⁶ on the basis of which admission had been denied. The court said (351 P. 2d at 172):

"We shall not compel the committee to abuse its trust and reveal its sources. This would not only sanction a breach of trust but would dry up its sources and destroy its future effectiveness. However, we cannot allow information of this nature to

⁶ The National Conference "does not make character investigation of new applicants for admission to the Bar for any state, except in unusual cases. Whether or not it should do so has been discussed in the past but it was felt that it was beyond the scope of the organization." Letter from Stanley G. Falk, Esq., Chairman of N. C. B. E., to Herbert Monte Levy, Esq., January 11, 1963.

be used by the committee for the purpose of denying a man due process in so vital a matter as the right to practice his chosen profession. * * * If respectable persons have derogatory information or bona fide charges to level against an applicant, they should not hesitate to come out into the open and speak the truth."

Accord, *Application of Guberman*, 90 Ariz. 27, 363 P. 2d 617; *State ex rel. Bar Examiners v. Poyntz*, 152 Ore. 592, 52 P. 2d 1141; *In re Crum*, 103 Ore. 296, 204 Pac. 948.

In *Moity v. Louisiana State Bar Association*, 239 La. 1081, 121 So. 2d 87, petitioner had sought an order from the Committee on Bar Admissions of the Louisiana State Bar Association permitting him to study law under the supervision of an attorney. The Committee had refused, asserting that it was not constituted to hold hearings or to permit applicants to question before it the basis for its conclusions as to the character of law students. The Supreme Court of Louisiana concluded (121 So. 2d at 91):

"[The applicant] is entitled to a hearing, at which he has a right to be present, to be represented by counsel, and to be given an opportunity to hear those matters which formed the basis of the Committee's action, as well as to introduce evidence and cross-examine the witnesses against him, if any."

The Court thereupon appointed a special commissioner to conduct a hearing and report on the matter.⁷

⁷ Such a procedure might also be utilized in New York under the residuum of power granted to the Appellate Division to "make further examination and inquiry through its Committee on Character and Fitness or otherwise." (Emphasis supplied; Rule VIII-2, quoted *supra* at p. 6.) In that connection, it might be noted that Petitioner's motion before the Appellate Division dated April 10, 1951 sought, among other things, appointment of "a Referee to hear and report upon the evidence taken before him, as to whether he possessed the character and fitness entitling him to be admitted." Had Petitioner's request in this regard been granted, he would have received a hearing incorporating the "safeguards" that the Supreme Court of Louisiana found to be essential, just as those involved in disbarment or disciplinary proceedings in New York receive a full hearing before a referee.

D.

The Attorney General argues: (1) that to the extent that the Committee received information "*ex parte* or through its investigators," Petitioner was notified of the nature of any such information and "given an opportunity to admit, deny or offer an explanation of the material involved" (Brief at p. 65), and (2) that the Committee in making a determination as to applicants' character and fitness does not rely upon *ex parte* information, but decides solely on its appraisal of the candor and truthfulness of the applicants' answers to questions pertaining to such information (Brief at p. 72).

A review of reports submitted by Committee members to the whole Committee at various times during the protracted period when Petitioner was seeking admission—one of which is reproduced in full as Appendix A to this brief [Ellison Report, May 31, 1950 (Cr. D. 76)]—demonstrates that the Committee had before it a number of charges against petitioner by a number of individuals, including the following:

1. A complaint by Mr. Leo Wieder, an attorney, that Willner's performance as a law clerk had been unsatisfactory (Ellison Report, p. 1).
2. A complaint by Mr. James Dempsey, Jr., an attorney, complaining about Willner's conduct in connection with certain litigation in which Willner was involved (Ellison Report, p. 1).
3. A complaint by a Mr. Sylvester Barone that Willner had been given some \$125 in connection with a business transaction, had converted it to his own use, and had not repaid \$100 of the sum owed (Ellison Report, p. 2).
4. A complaint by Mr. Wieder that Willner had assaulted him (Ellison Report, p. 4).
5. A complaint by a Mr. Harold Rosenblum that Willner had been guilty of unprofessional conduct as an accountant

in certifying to the correctness of a financial report, and in testifying falsely under oath in a proceeding before a referee that he was a member in good standing of the New York Society of Certified Public Accountants (Ellison Report, p. 6).

6. A statement by a Mr. Robbins, representing a defendant in a slander action instituted by Willner, that he had been unable to serve Willner to collect two judgments for court costs, and that the printer who had printed the record on appeal (presumably for Willner) had not been paid (Ellison Report, p. 9).

These charges, made *ex parte* by persons who did not appear at Committee hearings, who did not confront Willner, and who were not cross-examined by him, are set forth in reports made by individual members of the Committee to the full Committee, the reports recommending that the Committee refuse to certify Willner for admission (see Cr. D. 14. and 76). These reports indicate that the Committee's determinations did not rest exclusively on the nature and quality of Willner's responses to these charges. The reports indicate that, on the contrary, the Committee did, to some extent, consider these *ex parte* statements as themselves establishing the truth of the charges made against Willner, or as establishing the untruth of Willner's explanations or denials. In sum, *ex parte* statements, not subject to cross-examination, were given *evidential* weight. That conclusion, we think, is inescapable from a reading of the reports as a whole, and from the following portions of Mr. Ellison's report appended hereto:

(a) In connection with Willner's explanation of Wieder's assault charge, the report, having quoted Willner's testimony before the Committee, next states: "Mr. Wieder said that this statement was absolutely false" (Ellison Report, p. 5). If the Committee's determination was to be based exclusively on Willner's testimony, there

would have been no occasion to refer to Wieder's subsequent statements.

(b) The report sets out the details of the nature of Mr. Barone's complaint against Willner—that it was for conversion to his own use of \$125 given him in 1938 for a business purpose, and that Willner had given Barone five post-dated checks for \$5 each, but had not paid the balance of \$100—while Willner's testimony (given ten years later, in 1948) as set out in the report was no more than that he could not recall Mr. Barone or the transaction (Ellison Report, pp. 10-11). Unless some credit was to attach to Barone's *ex parte* statements, there was, we think, no point in describing the substance of those statements.

(c) The report sets out (p. 9) that Mr. Robbins had asserted that, as of February 27, 1948, the judgments for costs in the slander suit were unpaid because he had been unable to serve Willner. The report further notes (p. 9) that Willner's questionnaire, sworn to on May 27, 1948, stated that the judgments had been satisfied, but did not state when they had been satisfied. Unless evidential weight was being given to Mr. Robbins' *ex parte* statements, there was no occasion to set forth his statement that he had been unable to serve Willner.

(d) The report having recited that the final determination of the Committee had been postponed pending determination by the New York Society of Certified Public Accountants of Willner's application for reinstatement to that Society (p. 12), the report states (p. 12) that the Committee had been informed by the Society that Willner had advised the Society that "he could not appear before their Admissions Committee in connection with his application for reinstatement, and that if they did not approve his application in absentia they should return his fee and vitiate his application." Since Willner was not examined by the Committee with respect to his alleged inability to appear before the Society's Admissions Committee, it fairly

appears that the report attaches evidential weight to the information supplied *ex parte* by the Society to the Committee.⁸

We conclude that the record in this proceeding *does* indicate that the Committee, at least until 1950, *did* attach evidential weight to *ex parte* statements, not subject to cross-examination, of matters adverse to an applicant for admission, and did not rely exclusively upon its assessment of the truthfulness or candor of the applicant's own statements or testimony before the Committee. As this Court said, in *In re Oliver*, 333 U. S. 257, 277:

"It may be conceivable, as is here urged, that a judge can under some circumstances correctly detect falsity and evasiveness from simply listening to a witness testify. But this is plainly not a case in which the finding of falsity rested on an exercise of this alleged power. For this reason we need not pass on the question argued in the briefs whether a judge can, consistently with procedural due process, convict a witness of testifying falsely and evasively solely on the judge's ability to detect it from merely observing a witness and hearing him testify."

E.

It is clear that Petitioner was never provided, in *advance* of hearing, with a fair summary of the charges against him which he would be called upon to deny or explain. The Attorney General appears to contend that because the nature of the charges emerged in the course of questioning of Petitioner before the Committee, and because he was given a full opportunity "to admit, deny or offer an explanation of the material involved", there is no violation of due process. But notice of charges that emerges in the course of questioning hardly satisfies the standards

⁸ Willner's Petition in the Appellate Division in this proceeding recites that he has been a member of the Society since 1951 (R. 4).

of a fair hearing; reasonable notice must be given in advance of hearing. *Parker v. Lester*, 227 F. 2d 708 (9th Cir., 1955); *Roller v. Holly*, 176 U. S. 398, 409, 410; *Hecht v. Monaghan*, 307 N. Y. 461, 473.⁹ Failure to provide reasonable notice in advance is particularly unfair where, as in Character Committee investigations, questions pertaining to most every aspect of an applicant's life may be asked as relevant to the inquiry. Ambiguous questions or misunderstood lines of questioning can result in incomplete answers based on information only half recalled, and easily subject the applicant to seemingly fair charges of evasion and lack of candor and truthfulness.¹⁰ When this absence of fair notice is combined with a failure to afford an applicant an opportunity to confront and cross-examine the witnesses who have submitted the adverse information, it becomes clear, we submit, that the procedural rights afforded the applicant fall short of the protections required under the Fourteenth Amendment. *In re Oliver*, 333 U. S. 257, 273; *Morgan v. United States*, 304 U. S. 1, 18-9.

⁹ In a judicial proceeding, even the granting of notice as a matter of favor and grace will not suffice—notice must be provided for in the enabling law to satisfy due process. *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 424; *Wuchter v. Pizzutti*, 276 U. S. 13.

¹⁰ See discussion, *supra*, with respect to the Barone charge of events occurring in 1938, as to which Willner was examined by the Committee in 1948, without advance notice that he was to be examined on the subject.

POINT II

The New York Court of Appeals denied Petitioner due process of law in disposing of his constitutional claim upon a record not available to him.

As noted previously, the New York Court of Appeals requested and received from the Appellate Division the complete file relating to the Character Committee's investigation into Petitioner's fitness to practice law, including transcripts of Petitioner's several hearings before the Committee, various written complaints against Willner, and reports on the case written to the full Committee by Committee members dated, respectively, May 16, 1938, November 4, 1948 and May 31, 1950 (see pp. 10-11, *supra*). It appears clear that at least that portion of that file consisting of reports to the Committee summarizing the results of the Committee's investigations, and recommending that the Committee refuse certification, were not available to Petitioner prior to the Attorney General's amended cross-designation of the record in this Court, filed after this Court granted certiorari.¹¹

The vice of the judicial proceedings on Petitioner's instant application is that the New York Court of Appeals determined Willner's claim of denial of federal due process against him on the basis of a record which was not known to or available to him as a litigant.

Having granted Petitioner's motion for leave to appeal on the constitutional questions raised by the motion, and having determined to consider those questions on the appeal, due process of law required that Petitioner have available to him, as a litigant before that Court, the entire

¹¹ The Attorney General's original cross-designation specifically noted that some portions of the record before the Court of Appeals might be "confidential" and thus not available to Petitioner even before this Court.

record upon which the Court itself would make its determination.¹² The importance to Petitioner of obtaining access to the complete file maintained by the Appellate Division is indicated by the fact that the Attorney General, before this Court, relies on that file to rebut Petitioner's "assumption" that the Character Committee determined that Petitioner lacked the requisite character and fitness on the basis of *ex parte* charges in that record. Without access to that record, Petitioner obviously was unable to construct meaningful argument on this issue, oral or written, or to

¹² The difficulties of an applicant before the New York Courts in the light of such a situation were highlighted by the case of *Matter of Anonymous*, 10 N. Y. 2d 740, 219 N. Y. S. 2d 410. In that case, according to the uncontradicted assertions of the applicant's counsel in a brief filed in the Court of Appeals, the Clerk's Office of the Appellate Division, Second Department, advised Anonymous' attorney that there had been no opinion of the Appellate Division; no opinion was published at any time in the New York Law Journal, the daily paper in New York City which normally reports all decisions of the First and Second Departments; in fact, there was an opinion (11 A. D. 2d 917, 205 N. Y. S. 2d 807), which was not published until more than a year after the decision, under the title of *Anonymous*, but which was not in the sealed file of the case in the Court of Appeals. *Anonymous'* attorney advised the Court of Appeals that he did not know of the existence of the opinion until after oral argument had been commenced in the Court of Appeals. The result was that the oral argument was adjourned and the Character Committee, which had not appeared until that point, was directed by the Court of Appeals to appear by counsel on resumption of the argument. Its attorney (the Attorney General) in his brief used quotations from the confidential reports of the Character Committee, which had been unsuccessfully sought by *Anonymous* in the Appellate Division. Because of this, *Anonymous'* request was granted by the Court of Appeals (9 N. Y. 2d 901, 217 N. Y. S. 2d 80), to examine the hitherto confidential file. Upon examination of those papers, *Anonymous* was permitted to furnish the Court of Appeals with evidence relating to the previously undisclosed charges. The Court of Appeals, with *Anonymous'* new evidence before it, found "No sufficient basis in this record for denying petitioner application for admission to the bar", and remanded the proceeding to the Appellate Division. 10 N. Y. 2d 740, 219 N. Y. S. 2d 410, 411.

secure a meaningful hearing on the constitutional questions he presented for determination.

In *Chessman v. Teets*, 354 U. S. 156, 162, this Court held that *ex parte* settlement of a state court record on appeal violated procedural due process. Clearly, *ex parte* determination that the record on appeal shall consist largely of material not known or available to the litigant during the appeal itself even more clearly constitutes a denial of fundamental procedural rights.

It is, we submit, offensive to principles of due process in the determination of federal questions that the record upon which the Attorney General now asks this Court to affirm the judgment of the New York Court of Appeals on the merits of a constitutional question consists in major part of material which was not available to Petitioner in the Court of Appeals. Assuredly, there can be no serious question that the material which was contained in the file before the Court of Appeals was so confidential as to be not discloseable to Petitioner at that time if, at the special request of the Attorney General, that same material has now been filed in this Court, and provides the raw material for some fifty pages of printed factual material in the Attorney General's brief.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

HERBERT MONTE LEVY,
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HERBERT PRASHKER,
Attorneys for Amicus Curiae.

Dated: February 15, 1963.

APPENDIX A

Memorandum by Mr. Ellison

[1]* *In re: Nathan Willner*

The applicant passed the bar examination in June 1936.

He appeared before the Committee on May 4, 1937, and was examined. At that time the Committee had before it a complaint from Leo M. Wieder, an attorney, stating in substance that he had employed the applicant from May 18, 1931, to November 7, 1931, as a law clerk, and that because of absences, late hours and neglect of duties he had asked the applicant to resign because he "had not performed a regular law clerkship in accordance with the Rules." These facts were supported by entries in Mr. Wieder's diary, which were inspected by a representative of the Committee, and there had been filed by Mr. Wieder with the Court of Appeals a certificate of commencement of clerkship stating that the applicant had entered his office to serve a law clerkship. In his sworn questionnaire the applicant stated that he had never been employed in any law office. Further consideration of the application was deferred pending the result of investigation.

In December 1937 the Committee considered a letter received from James Dempsey, Jr., an attorney of Peekskill, New York, complaining about the applicant's conduct in connection with certain litigation in which the applicant was involved and which litigation he failed to disclose in his questionnaire or in a subsequent affidavit filed by him bringing the answers to his questionnaire up to date. Further consideration was deferred pending the result of investigation of Mr. Dempsey's complaint.

When this investigation was completed, a report dated May 16, 1938, was filed by Mr. Jackson, a member of the

* Indicates page number of report in original form in which it appears in Court record (C. D. 76).

Appendix A—Memorandum by Mr. Ellison

Committee, reviewing the facts involved up to that time and recommending, on the record and the misrepresentations made by the applicant, that his application be denied.

The applicant was then recalled and examined with [2] reference to the complaint of Mr. Dempsey and the information contained in the report of investigation.

While the application was being considered by the Committee, the applicant's wife asked that the applicant be given a further hearing. Her request was granted and the applicant was again recalled. At the conclusion of this examination the Committee concurred in Mr. Jackson's report and recommended denial of the application.

Subsequently the applicant's wife asked if she might appear before the Committee on behalf of her husband. She appeared before Mr. Jackson and made a statement on the applicant's behalf.

On November 22, 1938, a formal report denying the application, signed by all ten members of the Committee, was filed with the Court.

After the Committee had filed its report a letter was received from a Mr. Sylvester Barone dated January 25, 1939, stating in substance that in 1938 he had given the applicant \$125.00 "to be used as a deposit in a business transaction" and the applicant "converted this money to his use." The Committee's report having already been filed with the Court, this complaint was not investigated at the time it was received. Mr. Barone, however, was subsequently interviewed and stated that in 1939 the applicant gave him five post-dated checks for \$5.00 each and that the balance of \$100.00 had not been paid, nor had he seen the applicant since he had given him the \$125.00.

Under date of February 27, 1939, the Committee received from James Dempsey, Jr., the Peekskill attorney, a mimeographed letter apparently sent by the applicant to Mr. Francis H. Klein, Exalted Ruler of the B.P.O.E. of Peekskill, to the editor of the Peekskill Evening Star, and

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several residents of Peekskill, the contents of which Mr. Dempsey referred to as "libelous."

Under date of March 23, 1939, the Committee received from Mr. Julian D. Cornell, at that time a member of the Junior [3] Bar Committee of the Association of the Bar of the City of New York, which Committee was sponsoring a reception to recently admitted members of the Bar, a letter addressed to him by the applicant asking that he explain to the "neophytes" being welcomed to the legal profession "why I was not one of the successful candidates." The applicant's letter to Mr. Cornell continues:

"Would you point out to them the cowardly attribute that is manifestly concerned with a body of men who monopolize the very existence of a human being endowed with learning and ambitions, devoid of any personal aggrandizement that the Character Committee reaps?

Do you know of any system of jurisprudence with but any taint of justice, where a judgment is rendered without any reason, but merely steeped in stealth?

When you have done that, could I, the victim, be made aware of the admeasurement of administration of justice whereby my adverse decision was reached?"

Under date of April 7, 1939, the late Presiding Justice Francis Martin received a letter from the applicant from which the following is quoted:

"For over two years my application before the Character Committee had been pending.

There were some few sittings before five men at which I attended from time to time, but on each occasion they took on a more peculiar aspect, steeped in some fine spun sophistries that were so obviously

Appendix A—Memorandum by M^r. Ellison

prejudicial, that the subtlety they intended, were limp from loss of vitality. * * *

Then the ending off with *my inquiry* as to when the Committee would call me again, only to receive a letter in reply for the *very first time* that my application had been rejected.

No reason—no excuse—nothing. Five men with a collected experience of about 150 years, jockeyed and bandied my name about for two full years before the clerk made up their minds for them."

A similar letter was sent by the applicant to the other Appellate Division Justices.

Under dated [sic] of June 2nd and 12th, 1939, the applicant sent letters to Fred L. Gross, Esq., of the State Bar Association, and under date of June 12, 1939, wrote a similar letter to [4] Charles J. Buckner, Esq., of the State Bar Association, from which the following is quoted:

"With whatever ounce of energy you can muster in your being, you must in the name of true administration of justice add your voice against the cowardly method of unethical procedure in rejecting candidates to the Bar.

May I state that I am prepared to testify before your committee at my own expense, anywhere in the State of New York, in reference to my case—similar no doubt, to many others—whereby the Committee of Character and Fitness can be proven to be steeped in stealth; unethical in every sense of the word; political henchmen of a system of greediness which guarantees economic security to themselves alone; harboring the temerity to deprive rights without the necessity of stating reasons or conclusions of their particular findings; keeping the standards of attainments for admission castled in their own confines, in

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order to cloak their contemptuous determination in their exclusionary guillotine."

Under date of December 12, 1939, the Committee received from Leo M. Wieder, the attorney who originally complained against the applicant, a letter stating that the applicant had "severely assaulted" him on December 8, 1939. The applicant explained this incident in the questionnaire as follows:

"The case was adjourned on about ten occasions at least, because Mr. Wieder would run out of the court shortly before we were to appear before the Judges. On the last occasion, Judge Irving Ben Cooper, who was presiding, ordered Mr. Wieder to remain in Court and not to leave under punishment for contempt. Mr. Wieder remained and was ordered to the witness stand. There he RETRACTED his charges and the case was dismissed."

Mr. Wieder said that this statement was absolutely false; that he never absented himself from the Court; that adjournments were not more than three or four, and that he did not seek any of them; that when the case finally came to trial and he appeared on the witness stand, the Court asked him why he was withdrawing the charge, and he stated it was on the written promise of the applicant that he would not further annoy him.

On January 20, 1943, the applicant moved the Court for a rehearing and the Committee filed with the Court a memorandum setting forth the facts upon which the application had [5] been denied.

On February 16, 1943, the Court denied the applicant's motion for rehearing.

On January 16, 1948, the applicant served on the Committee copy of a petition and notice of motion for a rehearing. On this occasion the Committee did not file a memorandum for the information of the Court.

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On February 9, 1948, the Court granted applicant's motion "in so far as to refer petitioner's application to the Committee on Character and Fitness for rehearing."

On February 13, 1948, the following letter of complaint was received from Mr. Harold H. Rosenblum, an accountant:

"It has been my displeasure to meet up with Mr. Wilner on several occasions in the course of my practice. I herewith take this opportunity to state that Mr. Wilner has demonstrated unprofessional conduct, unbecoming a member of a learned profession, by certifying to the correctness of a financial report he has prepared and submitted to an official Referee, the results of which were based not on facts, but on the conjecture and the personal opinion of Mr. Wilner.

Furthermore, in October, 1947, while a witness before Official Referee, the Honorable John P. Cohalan, he testified under oath that he was a member in good standing of the New York State Society of Certified Public Accountants. He again repeated this testimony in November 1947 before the same referee. Subsequent investigation disclosed the fact that he was not a member of said society for many years, and he still is not a member of the New York Society of C.P.A.'s now.

It is therefore my considered opinion that Mr. Wilner is not a fit person to be admitted into your honorable body."

Upon receipt of the letter, the Committee's representative talked with Mr. Rosenblum on the telephone and was informed that in certain proceedings before Official [sic] Referee Cohalan the applicant had testified on behalf of the plaintiff in an action entitled John Alders and Curtis M.

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Marx vs. Ora W. Grow; that among other things the applicant testified that he was at that time (July 1, 1947) a certified public accountant and was a member of the New York State Society of Certified Public Accountants. The following are excerpts from the [6] stenographer's minutes of the applicant's testimony before the Referee:

"Direct examination by Mr. Windsor:

Q. Are you a certified public accountant? A. Yes, I am.

Q. And are you any—a member of any society of certified public accountants? A. Yes, I am.

Q. What society? A. New York State Society of Certified Public Accountants.

Q. For how long a time have you been a member of the Society? A. Well, I started in 1936 and due to the lapse of my illness I let things lapse. Then I was reinstated and I am a member in good standing today.

Q. I show you this paper, Mr. Willner, and ask you what it is? A. That is my certificate issued to me from the New York State Society of Certified Public Accountants showing that I was a member since the sixth of March 1936 and I was reinstated as such.

Mr. Windsor: I offer that in evidence.

The Referee: You don't need it. I will take it without putting it in. Just make it as a statement unless they object to it on the cross-examination. You may want to keep that certificate. Show it to your adversary."

(NOTE: S.M. pp. 238-239. Then followed a colloquy about a slander suit brought by Willner against Hermelin for \$25,000, reference to which will be made later on in this report.)

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October 16, 1947.

"Cross-examination by Mr. Harmelin:

Q. You testified that you are a certified public accountant, Mr. Willner? A. Yes, sir.

Q. How long have you been such a certified public accountant? A. Since January 3, 1936.

Q. And you are a member of the State Association of Accountants? A. The New York State Society of Certified Public Accountants; I am a member.

Q. Are you a member in good standing? A. Yes, I am.

Q. Since when have you been a member in good standing of this Society of Public Accountants? A. I have their certificate since, I believe, 1936.

[7] Q. Have you ever been dropped from membership for any time? A. I did not. I let my dues lapse. But in view of the fact that you raised the question I have got myself reinstated. I am a member in good standing.

Q. When were you reinstated as a member in good standing? A. Oh, a couple of months ago.

Mr. Carew: Your Honor, I think I will object to this line of questioning. I do not think he has to belong to that organization to be a certified public accountant.

Mr. Hermelin: It is a question of credibility. The Referee: That he does not belong?

Mr. Hermelin: That's right.

The Referee: Would you say that any lawyer who did not belong to the Bar Association was not a qualified attorney?

Mr. Hermelin: If he testified that he did and he did not he would be guilty of perjury, wouldn't he?

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The Referee: Take him to the District Attorney then.

Mr. Hermelin: We will prove that.

The Referee: You won't prove that before me. I am not trying anybody for perjury.

Mr. Hermelin: It is a question of credibility. That is the only purpose of my offering it before your Honor.

The Referee: What was the motion made?

Mr. Carew: I will withdraw the objection, if that is what he wants it for." (S.M. pp. 288-290.)

In Connection with the applicant's statement that he was at the time of his appearance before Referee Cohalan a member of the New York State Society of Certified Public Accountants, a representative of the Committee interviewed Miss Mary C. Tully, the Office Manager of that Society, and received from her the following information: The applicant became a member of the Society on February 20, 1936; was dropped for non-payment of dues March 31, 1940; was reinstated May 13, 1940; dropped for non-payment of dues March 17, 1941; applied for reinstatement on June 20, 1947.

[8] On June 11, 1948, the Committee's representative interviewed Mr. Wentworth F. Gant, Executive Secretary of the New York State Society of Certified Public Accountants and was informed:

" * * * that a complaint was filed by a member of the Society concerning his statement, under oath, in the Supreme Court Case of John Alders et al. vs. Gros that he was a member of The New York State Society of Certified Public Accountants in good standing having been reinstated as such."

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Mr. Gantt further stated that the applicant's application for "readmission to the Society is being held up for further investigation by our Committee on Admissions."

(Note: In his questionnaire verified May 21, 1948, under Q. 20, which asks for the names, addresses, etc. of every group, association, society or organization of which he is or had been a member, the applicant makes the following statement: "N. Y. State Society of C.P.As—15 E. 41 St., N. Y. C.—12 years.")

In the slander suit hereinbefore referred to brought by the applicant against Marc Hermelin, the attorney who represented the defendant in the litigation before Referee Cahalan, the complaint was dismissed and judgment obtained against the applicant for \$49.50 upon the dismissal of the action on the record on motion, and \$40.46 upon affirmance of the order and judgment of the Supreme Court dismissing the complaint on motion.

On February 27, 1948, Mr. Robbins, who represented Mr. Hermelin in the slander action, stated that they had been trying to serve the applicant to collect the two judgments but had not been able to do so. Mr. Robbins also stated that the printer who printed the record on appeal had recently telephoned him and stated that he had not been paid for printing the record on appeal.

(Note: In his questionnaire verified May 27, 1948, the applicant referred to these judgments and stated that they had been satisfied but did not say when they were satisfied.)

In a questionnaire issued to the applicant on February 20, 1948, and filed on May 21, 1948, the applicant reported seven [9] cases of civil litigation in which he was involved, and that in one instance he charged Mr. Wieder with simple

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assault; in another he filed a cross-complaint for simple assault against a man named Silverstein; and a complaint against one Hymie Drath for attempted assault. He also reported that he had borrowed \$1,080.00 from the National City Bank on which there was still due \$270.00 to be paid in three instalments.

To Q. 25 of the questionnaire, which asks whether, if admitted, he intends to practice law, he makes the following statement:

“I intend to practice in conjunction with my accounting practice as a tax practitioner.”

Pursuant to the order of the Appellate Division granting a rehearing, the applicant was recalled and examined at length by the Committee on June 16, 1948, on the record, questionnaire and other papers filed by him on May 21, 1948, after his petition for rehearing had been granted.

On his appearance before the Committee, when told the Committee would be glad to hear any statement he had to make as to why the Committee should change its recommendation to the Court, he made the following statement (S.M. p. 45):

“Well, I seek to retrieve my reputation in the field that I practice. I don’t want to be alluded to as a disbarred attorney. I want to clarify my reputation with my children * * * and I want to be a free man amongst men. I feel I ought to be given some consideration. Eleven years have passed, I have done everything I possibly could to stay out of the courts and be as ethical as I know. * * * The one thing I look forward to is to retrieve this right. I don’t think I will ever practise in the profession. I want to continue in my own profession and be a Certified Public Accountant.”

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Concerning the letters hereinbefore referred to as having been written by the applicant to the late Presiding Justice Francis Martin, Julian D. Cornell, Fred L. Gross, Charles J. Buekner and others, the applicant admitted writing and sending them, because "he had a strong resentment at that time" but was "willing to retract it in any way", even publicly.

Concerning the complaint of Mr. Sylvester Barone, [10] heretofore referred to, the applicant testified before the Committee as follows (S.M. pp. 63-63):

"By Mr. Jackson:

Q. Did you have any controversy with a Mr. Sylvester Barone? A. Controversy?

Q. About 1938 or 1939. A. Sylvester Barone? 1938 or 1939?

Q. Yes. Do you recall Mr. Barone? A. Not off-hand, no.

Q. Do you recall his giving you \$125 as a deposit in a business transaction? A. A business transaction? Not that I recall.

Q. And that thereafter Mr. Barone tried to get the money back and you gave him five post-dated checks for \$5.00 each? A. Barone?

By Mr. Ellison:

Q. You got \$125 as a deposit in a business transaction from Barone. A. 1939, is that it?

Q. 1939. January, 1939.

By Mr. Muldoon:

Q. Do you know Mr. Barone? A. The name is not familiar to me, that's the only thing. I wouldn't deny anything.

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By Mr. Jackson:

Q. Do you recall in 1939 giving Mr. Barone five post-dated checks for \$5.00 each? A. I might have. I'm not certain of the name, that's the only thing I'm doubtful about.

By Mr. Ellison:

Q. Did you have such a transaction with anyone that you recall about that time and receiving \$125 in cash as a deposit for a business transaction and giving him five post-dated checks for \$5.00 each when he asked for the return of his deposit? A. Possibly, I don't know."

At the conclusion of the examination the applicant was requested to file certain additional papers.

On November 10, 1948, he was recalled and after further examination the Committee voted to withhold decision pending the result of action by the New York State Society of Certified Public Accountants on the application for reinstatement, and the outcome of pending litigation in which he was a witness before Referee Cohalan, and in connection with which [11] the attorney Marc Hermelin contemplated bringing the matter to the attention of the District Attorney with respect to applicant's misstatements concerning his membership in the New York State Society of Certified Public Accountants.

Recently the Committee was informed by the New York State Society of Certified Public Accountants that the applicant had told them he could not appear before their Admissions Committee in connection with his application for reinstatement, and that if they did not approve his application in absentia they should return his fee and vitiate his application; that the Committee would not ap-

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prove the application without an interview and his application for reinstatement and the fee were returned.

The Committee has also been told by Mr. Hermelin that the litigation heretofore referred to is still unsettled and that it is questionable whether he will refer the applicant's testimony in that litigation to the District Attorney's office.

As the record stands, it would seem to me that this matter should now be disposed of. I am of the opinion that the applicant does not possess the necessary character and fitness for admission to the Bar, and, therefore, recommend that the Committee adhere to its original decision denying the application.

s/ MILLARD J. ELLISON.

Dated New York, May 31, 1950.